IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-64,582-03

EX PARTE JOSEPH C. GARCIA, Applicant

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS AND MOTION FOR STAY OF EXECUTION CAUSE NO. W01-00325-T(C) IN THE 283RD JUDICIAL DISTRICT COURT DALLAS COUNTY

ALCALA, J., filed a dissenting opinion.

DISSENTING OPINION

The United States Supreme Court has recognized a categorical bar against executing individuals who were juveniles when they committed their capital offenses;[1] against executing intellectually disabled persons;[2] and against executing those whose offenses against another person did not result in the death of the victim.[3] The question presented by

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1 *Roper v. Simmons*, 543 U.S. 551 (2005).

2 *Atkins v. Virginia*, 536 U.S. 304 (2002).

3 *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

this case is whether the reasons underlying those decisions should also apply to categorically preclude the death penalty for a defendant convicted as a party to a capital offense in the absence of evidence showing that he actually killed or intended to kill another person. This argument is raised by Joseph C. Garcia, applicant, in his instant subsequent habeas application challenging the death sentence that was imposed against him as a result of his participation in an armed robbery of a store along with six co-defendants, several of whom shot and killed a peace officer during their flight from the scene. Applicant asserts that he was not present at the moment of the shooting and that he lacked any intent to kill the officer or anyone else. Furthermore, since the time of his last habeas application in 2007, applicant suggests that, in light of evolving standards of decency, a national consensus has now emerged against executing a defendant convicted of capital murder as a party who did not kill or have any intent to kill. Based on applicant's pleadings and the State's response opposing his application, I reach three conclusions at this juncture. First, I would stay applicant's impending execution to fully consider the merits of this complaint. Second, I would hold that applicant has alleged sufficient new facts that have emerged in the decade since his prior habeas application, and thus he has met the procedural requirements for consideration of his complaint in this subsequent habeas proceeding. Third, I would remand this case to the habeas court for factual findings and conclusions of law to substantively address applicant's complaint that the Eighth Amendment to the federal Constitution now categorically prohibits the execution of a defendant convicted as a party under certain

circumstances. Applicant presents colorable arguments that the reasons underlying the categorical prohibition against the death penalty in other circumstances also largely apply to a defendant convicted as a party who did not actually kill or intend to kill anyone. Because the Court declines to consider this issue and dismisses the application as subsequent, I respectfully dissent.[4]

I. Background

In 1996, after his conviction for murder, applicant was sentenced to fifty years in prison. In December 2000, while he was confined in Karnes County for that offense, applicant and six other prisoners, who later became known as "the Texas Seven," escaped from prison, injuring but not killing several people in the process. They took a large number of firearms and ammunition from the prison, and they committed various criminal offenses following their escape. Eleven days after their escape from prison, they committed an armed robbery of an Oshman's Sporting Goods store in Irving. During the robbery, one of the seven men remained outside the store as a lookout, while the rest of them, including applicant, each armed themselves with revolvers and entered the store as it prepared to close that evening. Inside the store, applicant and one or two other perpetrators gathered the employees into the break room at the back of the store and began tying them up. The other perpetrators stayed inside the store collecting merchandise and emptying the safes and cash

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[4] The issue at this juncture is not whether applicant will ultimately prevail in his legal claim. Rather, the issue is whether he has pleaded facts to overcome the procedural bar, which he has, and whether his complaint should be addressed on its substantive merits, which it should.

registers. During these events, a witness outside the store suspected something was wrong and called 911. The lookout informed George Rivas, the group's leader, that the police were on their way. At that time, Rivas was in the process of moving the group's getaway vehicle to the store's back loading dock area. Over radio communication, Rivas notified his co-defendants in the break room, including applicant, that they were running out of time and needed to hurry up and get out of the store, but applicant and his co-defendants responded that they were not done tying up the employees. As this was occurring, Irving peace officer Aubrey Hawkins approached the back loading dock area of Oshman's. He pulled his patrol car behind the getaway vehicle. At Rivas's instruction, applicant and the other perpetrators guarding the employees left the break room. Within seconds, there were three quick volleys of gunfire resulting in Hawkins's death. Rivas and another perpetrator, Randy Halprin, were also shot but did not die. The group entered the getaway vehicle and escaped to Colorado, where six of them were arrested.[5] The seventh perpetrator, Larry Harper, committed suicide before he could be arrested.

At applicant's trial for capital murder, the State conceded that it could not prove beyond a reasonable doubt which of the perpetrators had fired their weapons at Hawkins. But the State emphasized that, even if he had not shot at Hawkins, applicant was nevertheless criminally liable for Hawkins's death pursuant to Texas's law of parties that permits a

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[5] Of the six defendants who were apprehended for this offense, all six of them received death sentences. Three have already been executed, while the remaining three, including applicant, remain confined on death row awaiting execution.

finding of guilt either as a principal-party or a conspirator-party.[6] The jury instructions at the guilt/innocence phase permitted applicant to be convicted as a direct actor or as a party, either as a principal or conspirator. Specifically, those instructions permitted applicant to be convicted of capital murder under one of several possible scenarios: (1) if the evidence showed that he shot Hawkins himself; (2) if the evidence showed that one of the other Texas Seven members shot Hawkins and applicant solicited, encouraged, directed, aided, or attempted to aid the other in that act; or (3) if the evidence showed that applicant entered into a conspiracy to commit robbery and one of his co-conspirators shot Hawkins in furtherance of the conspiracy in a manner that should have been anticipated as a result of carrying out the robbery, regardless of whether applicant had any intent to kill Hawkins.[7] The State's closing arguments emphasized the importance of the law of party liability, noting that the law of parties "is huge here" and that the law "holds them all responsible" for the group's conduct in killing Hawkins. After the jury found applicant guilty of capital murder, in addition to the future-dangerousness and mitigation special issues, the punishment phase instructions also included what is commonly referred to as the "anti-parties" special issue. That instruction asked the jury to determine whether applicant "actually caused the death of the deceased, [ ] or did not actually cause the death of the deceased but intended to kill the deceased or

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6 *See* TEX. PENAL CODE §§ 7.01-7.02.

7 For each of these three scenarios for liability, the State was permitted to prove capital murder for Hawkins's status as a peace officer or that the death occurred while in the course of a robbery.

anticipated that a human life would be taken[.]"[8] The jury answered "yes" to this question and the future-dangerousness special issue, and it answered "no" to the mitigation special issue. The trial court sentenced applicant to death.

This Court subsequently affirmed applicant's conviction and death sentence on direct appeal. *Garcia v. State*, No. AP-74,692, 2005 WL 395433, at *5 (Tex. Crim. App. Feb. 16, 2005) (not designated for publication). Applicant has filed two prior applications for post-conviction habeas relief, an initial application filed in 2004 and a first subsequent application filed in 2007, both of which were rejected by this Court. *Ex parte Garcia*, No. WR-64,582-01, 2006 WL 3308744, at *1 (Tex. Crim. App. Nov. 15, 2006) (per curiam) (not designated for publication); *Ex parte Garcia*, No. WR-64,582-02, 2008 WL 650302, at *1 (Tex. Crim. App. Mar. 5, 2008) (per curiam) (not designated for publication). The instant application is his second subsequent application.

In this second subsequent habeas application that was filed around eleven years after the prior subsequent application, applicant presents five claims asserting various constitutional violations.[9] Because of the limited window of time before applicant's impending execution for this crime, I will address only his third claim challenging the

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[8] *See* TEX. CODE CRIM. PROC. art. 37.071, § 2(b)(2).

[9] Applicant's instant allegations include: (1) Due process violation based on the presentation of false and misleading evidence; (2) Due process violation based upon newly discovered evidence showing that the trial judge harbored racial animus towards non-whites; (3) Eighth Amendment violation based upon imposing the death penalty for defendants who neither killed nor intended to kill; (4) Sixth Amendment violation based upon the ineffective assistance of counsel; and (5) Eighth Amendment violation based upon execution occurring after fifteen years on death row.

constitutionality of his death sentence on Eighth Amendment grounds, which I conclude should be addressed on its merits rather than summarily dismissed and justifies a stay of execution in this case.

II. Whether the Eighth Amendment Prohibits the Execution of a Person who Neither Killed nor Intended to Kill

In his instant pleadings challenging his death sentence, applicant contends that the Eighth Amendment would now preclude his execution under these circumstances, which he suggests show that he neither killed nor intended to kill anyone during the commission of this offense. Applicant asserts that "this Court should hold that the evolving standards of decency embraced by the Eighth and Fourteenth Amendments to the U.S. Constitution no longer tolerate the execution of an individual convicted of capital murder without evidence that he killed or intended to kill the victim." I agree with applicant's contention that new facts have emerged since his previous subsequent application that support this claim, such that the claim should not be subject to the procedural bar on subsequent writs but should instead be resolved on its merits. Therefore, I would grant applicant a stay of his execution and remand this case to the habeas court for it to hear evidence and arguments on the issue of whether a national consensus has emerged against the execution of a person who did not directly cause the death of another or intend to kill another.

A. Substantive Arguments on the Merits of This Claim

The record in this case suggests that applicant was likely convicted as a party-conspirator to this offense, given the State's concession at his trial that it could not prove

which members of the group were directly responsible for Hawkins's death. The evidence adduced at applicant's trial showed that Hawkins had been shot eleven times by several different shooters, and the State suggested that applicant was at least in the loading dock area at the time of the shooting, but it presented no evidence to show that applicant fired any shots at Hawkins. As noted above, the State's closing argument emphasized that such evidence was unnecessary because Texas's law of parties would permit applicant's conviction as a party or conspirator to this capital offense. Applicant now contends that evidence from his trial, combined with evidence from his co-defendants' trials, conclusively shows that he was not one of the people who shot Hawkins. Specifically, applicant observes that the State's firearms and tool marks expert witness testified at his trial that "a total of five guns [] had bullets and/or cartridge cases that were fired from them" in the loading dock area where Hawkins was killed. Applicant further argues that the State presented evidence at his co-defendants' trials that identified the five members of the Texas Seven as those whose weapons were discharged: (1) George Rivas testified at his own trial that he initiated the gunfire and shot the peace officer multiple times, (2) Donald Newberry gave a statement to police indicating that he "fired three rounds" at the peace officer, (3) Larry Harper was identified as a shooter by co-defendant Randy Halprin who said Harper was shooting at the peace officer's car, (4) Randy Halprin was identified as a shooter by an investigating detective based on statements made by co-defendants who said Halprin shot co-defendant George Rivas and himself in the foot, and (5) Michael Rodriguez indicated in a statement

that his gun was wrapped in yellow electrical tape and that he dropped it when he grabbed the peace officer, and the State's firearms expert testified that a bullet recovered at the scene had been fired from this gun. In light of this evidence, applicant contends that it is now conclusively shown that he was not one of the individuals who directly caused Hawkins's death by shooting him, nor was it shown that he even attempted to shoot Hawkins by discharging a firearm.

At this juncture, I do not make any ultimate determination regarding whether the evidence conclusively establishes what applicant suggests. That is a factual question that is more properly resolved by the habeas court on remand, rather than by this Court based on pleadings alone. The more pressing question at this juncture is whether, assuming the evidence would show that applicant was not one of the shooters, his death sentence is nevertheless constitutionally permissible because he either intended to kill Hawkins or anticipated that a human life would be taken during the commission of the robbery. As noted above, the anti-parties special issue submitted to the jury asked it to determine "whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken." TEX. CODE CRIM. PROC. art. 37.071, § 2(b)(2). Assuming, as applicant suggests, that the jury could not have reasonably concluded that he directly caused Hawkins's death by shooting him, the jury was left with the options of finding that applicant, acting as a party as a principal or as a conspirator, either intended to kill Hawkins or anticipated that a life

would be taken. Applicant concedes that, if the evidence were to show that he intended to kill, then the Eighth Amendment would not preclude his execution under these circumstances, but he asserts that no such evidence was presented at his trial. Thus, applicant's arguments are limited to contending that the Eighth Amendment now prohibits the execution of one who, as a party-conspirator to a capital offense, merely anticipated that a human life would be taken but lacked any intent to kill.

As applicant suggests, the contours of the Eighth Amendment are defined by "the evolving standards of decency that mark the progress of a maturing society." *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002). An inquiry regarding the evolving standards of decency must be informed by "objective evidence," including legislative enactments and actual sentencing practices. *Id.* at 312. Other considerations, including the penological purposes served by the death penalty, may also bear on the inquiry. *Id.* at 318-19. When the prevailing evidence shows that standards of decency have shifted on a national level, the Supreme Court has not hesitated to recognize corresponding changes in the dictates of the Eighth Amendment. *See, e.g., id.* at 310, 317 (taking note of a "dramatic shift in the state legislative landscape," as well as noting rarity of actual executions of intellectually disabled persons, in support of holding recognizing a categorical bar against such executions).

Applicant acknowledges that the Supreme Court has already spoken on the issue before us today, over thirty years ago in *Tison v. Arizona,* 481 U.S. 137, 138, 158 (1987). In *Tison*, the Supreme Court held that the death penalty is constitutionally permissible for a

party who neither killed nor intended to kill a victim when the party was a major participant in the felony committed and displayed reckless indifference to human life. *Id.* at 158. As part of its explanation for permitting the death penalty under these circumstances, the Supreme Court in *Tison* noted that "the majority of American jurisdictions clearly authorize[d] capital punishment" for defendants who were major participants in a felony and who exhibited a reckless disregard for human life. *Id.* at 155. Applicant, however, asserts that this is no longer a true statement in light of more recent legislative and policy developments that have emerged in the decades since *Tison* was decided. Applicant notes that more than thirty jurisdictions (of fifty-two, counting the federal government and Washington, D.C.) have made legislative or judicial decisions disallowing the death penalty for non-triggermen who lacked the intent to kill. *See* Joseph Trigilio & Tracy Casadio, *Executing Those Who Do Not Kill: A Categorical Approach to Proportional Sentencing*, 48 AM. CRIM. L. REV. 1371, 1400-01 (2011). This includes twenty-one jurisdictions that have outlawed the death penalty altogether, combined with thirteen other jurisdictions that permit the death penalty but disallow that punishment for parties to a capital offense who lacked any intent to kill.[10] Comparing this majority of states that oppose the death penalty for non-

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[10] The authors of this article identified the following death-penalty jurisdictions as having legislative or judicial decisions against use of the death penalty for non-triggermen who lacked the intent to kill: Alabama, Georgia, Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana, Ohio, Oregon, Pennsylvania, Virginia, and Wyoming. In addition, applicant noted the following jurisdictions that do not employ the death penalty: Alaska, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, Washington, West Virginia, Wisconsin, and the District of Columbia. As applicant notes, in evaluating the scope of Eighth Amendment protections, the

triggermen to the Supreme Court's reliance on a national consensus against the death penalty in other specific contexts, applicant contends that this "clear majority is more than enough to establish a national consensus against the execution of an individual who neither killed nor intended to kill." Applicant suggests that, in other contexts, the Supreme Court has recognized that thirty states' pronouncements against a particular sentencing practice constituted a "national consensus" for purposes of gauging the evolving standards of decency against the imposition of the death penalty. *See Atkins*, 536 U.S. at 314-16; *Roper v. Simmons*, 543 U.S. 551, 564 (2005).

Applicant also notes that, in recent decades, even in states that technically allow the death penalty for conspirators who lacked any intent to kill, such executions are rarely carried out, with only a handful of such executions being carried out in recent years. The Death Penalty Information Center reports that, in approximately the past decade, no state has executed an individual who was convicted as a conspirator without evidence of an intent to kill, and only ten such individuals have been executed nationwide in the period since 1985.[11] Of those ten individuals, five were executed in Texas.[12] I agree with applicant's suggestion

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Supreme Court has looked to the practices of active death-penalty jurisdictions as well as those jurisdictions that preclude the practice altogether. *See, e.g., Roper*, 543 U.S. at 564-65 (including states that had abolished the death penalty in determining that a national consensus existed against execution of juveniles).

[11] Death Penalty Information Center, *Those Executed Who Did Not Directly Kill the Victim,* available at https://deathpenaltyinfo.org/those-executed-who-did-not-directly-kill-victim, last visited Nov. 28, 2018.

[12] As applicant points out, commentators in the public media have recently noted that Texas is among a minority of jurisdictions that permit capital punishment for those convicted of capital

that the fact that executions of such individuals are carried out so infrequently provides additional persuasive evidence to support the existence of a national consensus against the practice. *See, e.g., Kennedy v. Louisiana*, 554 U.S. 407, 433 (2008) (confirming consensus against capital punishment in cases of rape of a child by looking at the rarity of death sentences and executions for that crime); *Atkins*, 536 U.S. at 316 (noting that only five states had executed an intellectually disabled person in the thirteen years prior to that decision).

Moreover, I agree with applicant's suggestion that imposition of the death penalty against a party to a capital offense who neither killed nor intended to kill is on tenuous ground with respect to the underlying penological purposes of the death penalty. The Supreme Court has recognized two principal social purposes of capital punishment: retribution and deterrence. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). Insofar as deterrence, the Supreme Court has recently recognized that capital punishment "can serve as a deterrent only when murder is the result of premeditation and deliberation." *Atkins*, 536 U.S. at 319. And regarding the retributive

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offenses as conspirators. *See* Hooman Hedayati, *Texas "law of parties" needs to be revamped*, HOUSTON CHRONICLE (July 22, 2016), https://www.houstonchronicle.com/opinion/outlook/article/Hedayati-Texas-law-of-parties-needs-to-be-8404266.php ("Texas is not the only state that holds co-conspirators responsible for one another's criminal acts. However, it is one of few states that applies the death sentence to them."); *Texas needs to reform its 'law of parties,' which allows death penalty for people who haven't killed anyone*, DALLAS NEWS (Feb. 9, 2017), https://www.dallasnews.com/opinion/editorials/2017/02/09/texas-needs-reform-law-parties-allows-death-penalty-people-killed-anyone ("To date, 10 people who did not commit the actual killing have been executed in the U.S. under 'parties' or similar laws. Half of them have been in Texas. In some cases, the actual killer received a lesser sentence than the accomplice who was put to death.").

goals underlying the death penalty, the Supreme Court has emphasized that that punishment may be imposed only against offenders whose "extreme culpability makes them the most deserving of execution." *Roper*, 543 U.S. at 568 (internal quotations omitted). The instant case illustrates the possible difference between a record that does meet the *Tison* test's requirement that a defendant be a major participant who had a reckless indifference to human life, but that would not be adequate under applicant's proposed test that would require proof of his intent to kill, which is the type of evidence that is more consistent with the Supreme Court's descriptions of the death penalty as appropriate for deaths caused by premeditation, deliberation, and extreme culpability. Here, there is at least some evidence in the record that would support the view that, even though applicant was a major participant in the offense and he had reckless indifference to human life, he did not have the intent to kill Hawkins or act in a premeditated or deliberate manner in causing Hawkins's death, given the evidence that he was armed with a firearm and declined to shoot at Hawkins. Given this, I agree with applicant's suggestion that the retribution and deterrence goals underlying the death penalty may not be measurably advanced in the context of one who lacks any intent to kill, thereby providing an additional consideration weighing against the permissibility of a death sentence under these circumstances.

In sum, I agree with applicant that, in view of the emerging evidence that suggests a possible shift in societal standards, he has presented colorable arguments indicating that the execution of one who neither killed nor intended to kill does not comport with the Eighth

Amendment's prohibition on cruel and unusual punishment. I would stay his execution to permit further proceedings on this issue.

B. Applicant Has Overcome the Procedural Bar

In spite of applicant's persuasive arguments on this issue, this Court holds that it may not consider the merits of this claim at this juncture, and it dismisses the application as subsequent. I disagree with this approach and would instead hold that applicant has alleged sufficient facts to show that his claim relies on a new factual basis, thereby entitling him to consideration of his claim on its merits.

The Court's majority order summarily concludes that applicant cannot overcome the statutory bar on subsequent writs because he has failed to show that he meets any of the exceptions that would permit consideration of his claim, including reliance on new facts. *See* TEX. CODE CRIM. PROC. art. 11.071, § 5. But, as noted above, applicant has cited various sources that are newly available since his prior application that was filed over a decade ago. Furthermore, because of the particular nature of this claim which asserts a recent shift in societal views as reflected by recent legislation and current sentencing practices in other jurisdictions, this is the type of factual inquiry that is better addressed through a hearing in the habeas court, rather than summarily rejected based on pleadings alone. I would hold that applicant has alleged sufficient facts to show that his claim relies on a new factual basis, and I would permit him to litigate this claim on its merits.

C. This Case Should Be Remanded to the Habeas Court

At this juncture, the only matters before this Court are applicant's motion to stay his execution and his pleadings underlying his second subsequent habeas application and the State's response. The habeas court has not heard any evidence or made any findings of fact and conclusions of law. For all of the reasons described above, I would remand this case to the habeas court so that it may receive applicant's evidence on this issue and make findings of fact and conclusions of law.

I recognize that, even assuming that the law would prohibit the death penalty for someone who did not kill or intend to kill, there are aspects of this record that appear to support opposite conclusions as to whether applicant had the intent to kill. As noted above, on the one hand, the jury instructions permitted the jury to assess the death penalty based solely on a determination that applicant anticipated that a human life would be taken, and the jury that convicted him may have believed that he did not have the intent to kill because he did not fire his weapon at Hawkins. On the other hand, the jury instructions also permitted the jury to assess the death penalty based on a determination that applicant intended to kill Hawkins, and the jury may have believed that he did have that intent based on the totality of applicant's violent conduct. In the event that this Court were to ultimately hold that the Eighth Amendment prohibits the death penalty for a party to a capital offense who did not intend to kill, it would be possible that another jury would still sentence applicant to death under the theory that the totality of the evidence supports the reasonable inference that he intended to kill Hawkins. I do not reach that issue at this juncture. Rather, because the jury instructions here permitted applicant to be sentenced to death on a bare finding that he

anticipated a human life would be taken, without any required showing of an intent to kill, applicant is entitled to further proceedings on the constitutionality of his death sentence that was imposed pursuant to these instructions.

III. Conclusion

The Supreme Court has held that the death penalty must be imposed only against those who have engaged in the worst criminal conduct and who exhibit extreme moral culpability for their crimes. Over time, the Court has erected barriers to carrying out executions against categories of offenders who do not exhibit the type of extreme culpability that justifies this ultimate punishment. As it is this Court's unwavering obligation to uphold the federal Constitution and to ensure that executions are carried out in compliance with the requirements of the Eighth Amendment, I would not summarily dismiss applicant's complaint but would instead grant him a stay of his execution and permit further proceedings on the issue of whether he may lawfully be executed for his participation in this offense as a party-conspirator. Because the Court does not do so and permits applicant's execution to go forward without considering these issues, I respectfully dissent.

Filed: November 30, 2018

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